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# Supreme Court of the United States

OCTOBER TERM, 1940

No. 1056

THE SINGER MANUFACTURING COMPANY,
*Petitioner,*

*against*

NATIONAL LABOR RELATIONS BOARD.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# Supreme Court of the United States

OCTOBER TERM, 1940

THE SINGER MANUFACTURING COMPANY,
*Petitioner,*
*against*
NATIONAL LABOR RELATIONS BOARD.

No.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, The Singer Manufacturing Company, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree entered April 15, 1941 (R. IV, 57) by said court enforcing, as modified, an order of the National Labor Relations Board (hereinafter referred to as the Board) dated June 6, 1940, which directed petitioner to cease and desist from an alleged unfair labor practice under the National Labor Relations Act (49 Stat. 449) (hereinafter referred to as the Act), and to take certain affirmative action.

### OPINIONS BELOW

The decision and order of the Board (R. I, 238-275) was issued on June 6, 1940, and appears in 24 N. L. R. B. No. 41. The opinion of the Circuit Court of Appeals

(R. IV, 42) was handed down on March 21, 1941, and is not yet reported.

## JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. § 347(a), and Section 10(e) of the Act. The decree of the Circuit Court of Appeals for the Seventh Circuit to be reviewed was entered on April 15, 1941 (R. IV, 57).

## STATEMENT

Following the dismissal on the merits of an earlier complaint charging petitioner with refusal to bargain collectively with the union (R. II, 504),* representatives of petitioner and the union** met and bargained with each other on June 16, 17, 23, July 8, September 1, October 28, November 4, 17, December 16, 1938, and January 20, April 17 and 18, 1939 (Board's decision and order, R. I, 245) but failed to reach an agreement. The shortest of such conferences was one hour (R. II, 349); the longest was seven hours (R. II, 399); and the average was almost three hours (R. II, 339, 344, 346, 349, 356, 366, 374, 379, 385, 395, 400; R. I, 32).

On April 17, 1939, while the negotiations were still in progress, the Board issued its complaint against petitioner in this proceeding, charging that it "did refuse and fail to

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*Prior to the issuance of that complaint, petitioner and the union had held several collective bargaining conferences, but had failed to reach an agreement (R. I, 243).

**United Electrical, Radio and Machine Workers of America, Local No. 917, affiliated with the Congress of Industrial Organizations (R. I, 238).

bargain in good faith" with the union "with the intent to reach a collective agreement with the union", and thereby had engaged in unfair labor practices within the meaning of subdivisions (1) and (5) of Section 8 of the Act (R. I, 167, 170).*

There are no disputed questions of fact as to what took place at these conferences, or as to any other material fact involved. At the conferences, the respective parties made proposals and counter-proposals, sometimes orally, and sometimes in writing, and each advanced arguments in support of its own position, and in opposition to that of the other, in respect of the various matters discussed (R. I, 246-262; II, 339-427), but no agreement was reached. Letters were also exchanged by the parties during this period concerning the subject matter of the discussions held (R. II, 435-441; III, 36-57).

Petitioner at no time refused to meet with the union as the representative of its employees for the purposes of collective bargaining or to discuss with them the subject-matters which might be included in a collective bargaining agreement, and at no time did petitioner undertake to terminate the negotiations by reason of the succession of impasses developed therein. Indeed, the only attempt to terminate negotiations was made by the union and objected to by petitioner (R. II, 440, 441).

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*Section 8 of the National Labor Relations Act provides in part as follows:

> "SEC. 8. It shall be an unfair labor practice for an employer—
>
> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * * * * *
>
> "(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Nevertheless, on June 6, 1940, the Board entered its decision and order, in which, after a narrative review of the case, of a more or less argumentative character, the Board made the following ultimate finding (R. I, 271):

> "We find that on June 16, 1938, and at all times thereafter, the respondent [petitioner] refused to bargain collectively with the United as the exclusive representative of its employees within an appropriate unit, and that the respondent has thereby interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act."

On the basis of such finding, the Board ordered petitioner (R. 274-275), in the language of the Act, to cease and desist from

> "Refusing to bargain collectively with United Electrical * * * Workers of America * * * as the exclusive representative of the production and maintenance employees of the respondent at its South Bend, Indiana, plant * * *."

and "upon request" to "bargain collectively" with said union in such capacity.

Upon petition of petitioner for review, the court below entered a decree of enforcement* (R. IV, 57).

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*In accordance with the decision of this Court in *N. L. R. B.* v. *Express Publishing Co.*, 61 S. Ct. 693 (decided March 3, 1941), the court below modified paragraph 1(b) of the Board's order, which directed petitioner to cease and desist from "in any other manner violating the Act", to read as follows:

> "In any manner interfering with the efforts of the United Electrical, Radio and Machine Workers of America, Local No. 917, affiliated with the Congress of Industrial Organizations to bargain collectively with respondent" (R. IV, 58).

The Board's ultimate finding, upon which the order rests, like the order itself, is expressed in the language of the statute, and is apparently based upon the Board's conclusion previously expressed that "the respondent entertained no desire to reach an agreement with the United, and made no effort in good faith to do so" (R. I., 268). This conclusion is in turn based upon an extended review, analysis and appraisal by the Board of the positions assumed by petitioner and the union in respect of the subject matters discussed (R. I., 246-272). In respect of each, the Board is critical of the position assumed by petitioner, and concludes that petitioner either rejected a reasonable proposal of the union, advanced and insisted upon an unreasonable proposal, or failed to advance reasons which, in the opinion of the Board, constituted a sufficient justification for a rejection of the union's demand, or adequate support for its own (see *infra*, pp. 20-27).

The Board also appears to have proceeded upon the theory that it was the duty of the petitioner to open its books to the union for examination, or in the alternative, submit the matter of wages to arbitration (R. I., 252, 265), although not even the Conciliation Service of the Department of Labor has the right to demand an examination of an employer's books, or to compel arbitration of a wage controversy. Elsewhere throughout its decision the Board apparently proceeded upon the theory that the burden was upon petitioner in its negotiations with the union to justify the positions assumed by it by the submission of evidence satisfactory to the union (R. I., 254, 256, 257, 259, 265, 266, 267, 268), even to the extent of convincing the union of the *bona fides* of petitioner's motives (R. I., 268), and of furnishing the union with information, upon the basis of which it would be enabled "to point out to its members

the justice of the respondent's proposals or the propriety of the United's acceding to them" (R. I., 268).

Unlike other cases in which the employer has refused to meet with the representatives of the union, or, having agreed with them, has refused to reduce such an agreement to writing, or, although meeting with them and hearing their proposals, has refused to make any counter-proposals or take any definite stand of his own, the order in this case grows out of a failure of the employer to agree as to the substantive terms to be included in a contract.

Although the order is thus based upon conduct, which the Board, as we believe, erroneously finds to have been in violation of the Act, the order does not specify in what respect the employer must alter its conduct in order to comply therewith. It thus affords no guide for future action, nor does it provide any test by means of which compliance or violation of the decree enforcing the order may be determined.

## THE QUESTIONS PRESENTED

The ultimate questions presented are:

1. Did the Board, in finding that petitioner had failed to bargain collectively with the union, as required, and in entering an order against petitioner, correctly interpret the Act, and the powers conferred upon the Board thereby, or did it exceed the powers so conferred?

2. If, as found by the Board, petitioner has violated the statutory requirement that it bargain collectively with the representatives of its employees, is the order entered, which is framed in the language of the Act, and fails to specify in what respect petitioner should change its position or conduct in order to comply with such requirements,

a lawful order, or is it so vague and indefinite as to be bad on that account? Implicit in this question, of course, is the question as to what kind of an order the Board, assuming it has the power claimed to be possessed by it, must or should make in its exercise.

Each of these questions, of necessity, merges into the other, for reasons hereinafter stated. Each is also a part of a larger question, to wit:

3. To what extent, if at all, and under what circumstances, if any, may be the Board control the substantive positions of the employer who is engaged in the process of bargaining with the representatives of his employees, and if it may do so at all, in what manner may such control be exercised?

**Reasons Relied on for Allowance of the Writ**

In enforcing the Board's order the court below decided important questions of federal law in a way probably in conflict with the interpretation placed upon the Act by this Court in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45; *H. J. Heinz Co.* v. *N. L. R. B.*, 61 S. Ct. 320, 325; and *N. L. R. B.* v. *Express Publishing Co.*, 61 S. Ct. 693, and also in conflict with the decisions of this Court in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 548, and *Swift and Company* v. *United States*, 196 U. S. 375, 401, and with the decision of the Circuit Court of Appeals for the Sixth Circuit in *N. L. R. B.* v. *P. Lorillard Co.*, 117 F. (2d) 921, and, if not, decided important questions of federal law which have not been, but should be, settled by this Court.

1. The action of the court below, in accepting the Board's findings and enforcing its order, goes clearly be-

yond any case previously adjudicated by this Court, if not in conflict with the decisions of this Court. Although the Act has for its objective the making of collective bargaining agreements, and although, if the parties reach an agreement, the employer is required to reduce it to writing, the Act does not, as this Court has said, compel the employer to agree. *N. L. R. B.* v. *Jones & Laughlin Steel Corp., supra; H. J. Heinz Co.* v. *N. L. R. B., supra; cf. Virginian Ry. Co.* v. *System Federation No. 40, supra.*

In this case the employer met with representatives of the union on numerous occasions, made counter-proposals, discussed with the union at length the respective proposals of both parties, and extended to the representatives of the union every opportunity to discuss and negotiate further up to the filing of the complaint and beyond (R. II, 339-404). As evidenced by the employer's final statement of its position, while on certain phases of the negotiations its decisions were definitive, on others they were tentative, nor was discussion foreclosed as to the former (R. II, 443-450).

The Board concludes, solely from the positions taken by the employer, during the course of the negotiations, as to the substantive terms of the collective bargaining agreement, and not from any direct evidence as to purpose and intent on its part, that petitioner "entertained no desire to reach an agreement" with the union (R. I, 270; see I, 262). If this be the basis of the Board's decision, then it would seem that it must be predicated upon the theory that the Act not only regulates the conduct of the employer, in the particulars provided for therein, but also undertakes to control his state of mind.

Whether this be so or not, we think it is obvious that the Board's conclusions throughout are based upon a belief

on its part that the positions taken by the employer were unreasonable, by reason of which the Board finds lack of "desire" or "sincere purpose", as above described, and that its decision and order constitute an assumption of power to compel an employer to agree to such substantive terms and conditions of a collective bargaining agreement as the Board deems reasonable.

2. In *N. L. R. B.* v. *P. Lorillard Co., supra,* the Circuit Court of Appeals for the Sixth Circuit took a contrary view of the extent of, and limitations upon, the Board's power, and held that the Act does not authorize the Board "to shape or control the course of the negotiations between employer and employee, so long as the employer bargains collectively" and that the employer is "free frankly to state the terms upon which he may yield and those upon which he will not yield". The Court said that the employer's "sincerity" in negotiating "is to be tested by the length of time involved in the negotiations and the persistence by which the employer offers opportunity for agreement".

If the test applied by the Sixth Circuit be applied in this case, then there was no violation of the Act. These two decisions thus present a sharp conflict in the interpretation placed upon the Act.

If the test applied by the court below is the true test, then it is respectfully submitted that its inevitable consequence is to give to the Board power by indirection to compel an employer to agree to such terms as the Board may fix, and thus to confer upon it the power to determine the substantive terms of the agreement. A further effect is to impose upon one party to the negotiations (the employer) restrictions, duties and governmental supervision as to his conduct at the bargaining table not imposed upon the other

(the union). While the Act is in many respects one-sided in its operation, it was intended to provide equality of bargaining power between employers and employees (Act, Section 1). Under the Board's interpretation of the Act, sustained by the court below, such equality is destroyed. Under the interpretation placed upon the Act by the Sixth Circuit it is maintained, as we believe Congress intended it to be.

3. Although the Board found petitioner guilty upon the grounds stated, its order does not inform petitioner in what respect it must change the position assumed by it in order to comply with the statute. This is so because the order merely in terms requires the petitioner to "bargain collectively" within the language of the Act (R. I., 276; R. IV, 57).

The petitioner is therefore presented immediately with this question. May it, upon the resumption of negotiations, assume the same positions in respect of the various subject matters, and make the same arguments in respect thereto, or must it change its attitude or its arguments? To be specific as to the latter, must it, for example, open it books either to the union or to some government accountant, as demanded by the union, or be punished for contempt for failure to do so?

If no change of position is required, then both the order and decree are an empty gesture. If some change is required, the petitioner is without guide as to the extent of the change required to comply with the decree or order. If it adheres to its previous positions, then it would seem that it would be the duty of the court, if the decree is to become effective, to determine, in contempt proceedings, in what respect the employer should change its position in order

to purge itself of contempt; and if the employer has changed its position in part, that it would be the duty of the court to determine whether such changes were sufficient, or whether further changes should be made. In other words, if the employer has yielded on one point, should it have yielded on others—and, if so, on how many or on what? If it has yielded on two points, should it have yielded on others—and, if so, on what, and so on. An interpretation of the statute resulting in the exercise of such power by the court is, it is respectfully submitted, without warrant in the statute, and contrary to the whole policy of Congress defining the respective powers of administrative boards and of the courts generally.

If, on the other hand, the order is too vague and indefinite, for the reasons stated, what kind of an order should the Board make? The Act makes the findings of the Board conclusive if supported by substantial evidence. If, therefore, in the absence of direct testimony, and based solely upon the conduct of an employer who has actually bargained—as distinguished from one who has not—it may find that such an employer has violated the Act by reason of lack of "sincerity of purpose", there would appear to be little, if any, limit upon its authority in this regard.

The Act also confers upon the Board power to take such affirmative action as may be necessary "to effectuate the policies of the Act". The further question therefore arises, whether the Board, having found an employer guilty of violation by reason of lack of "desire" or "sincere purpose", may, in the exercise of this power, control his future conduct in the negotiations either in respect of positions assumed, or the submission of evidence hitherto withheld from the union, but which the Board thinks should be

submitted? If so, then by indirection the Act empowers the Board both to compel an agreement and to dictate its terms and to control the conduct of one party to the negotiations without any correlative power to control that of the other.

For reasons hereinafter stated, it is believed no such power was conferred upon the Board. In any event the questions presented in this case, their several ramifications, the range of permissible answers, the extension of the Board's powers beyond those hitherto affirmed resulting from the decision below, the difference between the theory of the Board's powers implicit in the decision of the court below and that contained in the decision of the Sixth Circuit in the *Lorillard* case, present a case in which the decision of the court below would appear to be in conflict with prior decisions of this Court cited above and with the decision of the Sixth Circuit in *N. L. R. B.* v. *P. Lorillard Co., supra;* or if not, to present important questions of federal law which have not been, but should be, settled by this Court.

It follows from the foregoing that

1. In enforcing the Board's order, the court below decided an important question of federal law in a way probably in conflict with the principles enunciated by this Court in *N. L. R. B.* v. *Jones & Laughlin Steel Corp., supra; H. J. Heinz Co.* v. *N. L. R. B., supra;* and *Virginian Ry. Co.* v. *System Federation No. 40, supra,* or, if not so in conflict, an important question of federal law which has not been, but should be, settled by this Court.

2. In enforcing the Board's order, the court below decided an important question of federal law in a way probably in conflict with the decision of the Circuit Court of

Appeals for the Sixth Circuit in *N. L. R. B.* v. *P. Lorillard Co., supra.*

3. In enforcing the Board's order, without specifying what petitioner is required to do or refrain from doing, the court below decided an important question of federal law in a way probably in conflict with the decisions of this Court in *N. L. R. B.* v. *Express Publishing Co., supra,* and *Swift and Company* v. *United States, supra,* or, if not so in conflict, an important question of federal law which has not been, but should be, settled by this Court, and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The questions presented, involving the extent to which the Act limits or controls the conduct of an employer who is actually engaged in negotiations as to the substantive terms of a collective bargaining agreement, have become of increasing public importance both to employers and to unions as decisions of the Board and the courts have defined and enforced the Act in other respects.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, commanding that court to certify and send to this Court, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 7509, The Singer Manufacturing Company, Petitioner, vs. National Labor Relations Board, Respondent", to the end that said cause may be reviewed and determined by this Court; that the decree of said court entered on April 15, 1941, be set aside and reversed; and that petitioner be granted such other and

further relief as to this Honorable Court may seem just and proper.

Dated May 12, 1941.

Respectfully submitted,

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